A Damaged Court Causing a Constitutional Crisis

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In late October 2020, Ukraine's Constitutional Court found major elements of Ukraine's legal framework on combatting corruption unconstitutional. The decision was met with so much backlash that the rule of law in Ukraine is now at stake. Additionally, it has caused a deep rift within the Constitutional Court itself, which is currently unable to take decisions as a number of justices refuse to participate in proceedings. The decision has thus not only undermined the ongoing efforts to fight corruption but has thrown Ukraine into a veritable constitutional crisis. While the events are still unfolding, it is clear that neither the resilience of the anti-corruption system nor the integrity of the judicial branch should be compromised.

Combatting corruption

Since the 2014 Euromaidan transition, Ukraine's political elites have pledged to combat corruption, a long-lasting malaise of Ukraine's public life. They adopted a two-fold approach: on the one hand the setup of an institutional infrastructure tasked with combatting and prosecuting corruption, and on the other hand a legal framework, including e-declarations, to account for illegal accumulation of assets by public servants. Regarding the institutional setup, new agencies within the executive and the criminal justice system were created: the Agency on Corruption Prevention (NAPC), the Anti-Corruption Bureau (NABU), and the Special Anti-Corruption Prosecution (SAPO). The creation of the High Anti-Corruption Court (HACC) to oversee criminal cases and appellations on cases involving corruption charges in 2018 marked the pinnacle of the reform on the institutional framework. With respect to policies and in order to entrench the prospect of EU integration, the *Verkhovna Rada* (Ukraine's parliament) adopted the Law "On Corruption Prevention" in late 2014. This is the law that was now in parts struck down by Constitutional Court.

The Constitutional Court's decision

Having lost political force since 2014, the pro-Russian political camp has been utilizing constitutional adjudication to crack down on post-Euromaidan achievements (for instance, there is a separate appeal on the constitutionality of the lustration law of 2014 still pending before the Court). The challenge of the constitutionality of the 2014 anti-corruption reform before the Court in August 2020 by a group of MPs representing the pro-Russian political camp in the *Rada* was the latest move. From the beginning, the August appeal had a considerable prospect of being supported by the Court. This was not the first time the Court was asked to rule over anti-corruption measures. In February 2019, the Court cancelled criminal liability for illicit enrichment by public servants. Back then, the Court adopted very technical approach to the

issue: it ruled that overburdening an individual (public servant) with an obligation to prove the legality of their income deprives a person the of presumption of innocence. The Court argued that a failure to provide evidence of the legality of income does not necessarily mean that assets were received illegally and, therefore, the actions can not warrant criminalization. The logic of 2019 the decision reverberated through the new decision of the Court.

In its latest decision, the Court framed the issue of 2014 anti-corruption reform in terms of the independence of the judicial branch. In view of the Court, the Constitution affords a high level of constitutional protection of the judicial branch, especially from encroachment and interference from the executive. The Court recounted institutional guarantees of judicial independence, arguing that institutional separation of powers means that courts and judges enjoy special protection from administrative control of the executive. In the realm of corruption prevention, this means that it should be upon the bodies of the judicial branch themselves to discipline judges and to monitor their activities. In the context of existing anti-corruption legislation, the Court reasoned that the prerogatives of the NAPC to gather, store, and publish asset declarations of public servants gave the executive leverage to control the judicial corpus, including the Constitutional Court. The Court cancelled provisions of the law granting the above-mentioned powers to the agency on corruption prevention and held there was need to adopt new legislation that would account for the special constitutional guarantees of the judicial branch.

The most controversial part of the decision concerned criminal liability of public servants if they fail to submit annual declarations on their income or knowingly provide false information. The Court annulled article 366-1 of the Criminal Code that was introduced by the Law On Corruption Prevention back in 2014. The Constitutional justices argued that there is a lack of evidence that the activities in question warrant criminalization. In other words, the punishment is not proportional to societal harm done by failing to submit or misinform in assets declarations. In view of the Court, legal liability should be ameliorated to a lesser form of responsibility (administrative liability). Altogether, the Court's decision hollowed out the anti-corruption reform by annulling on essentially the most important provisions of the 2014 law.

A Court not trusted

The decision of the Court was met with a fierce and intense response by the President and civil society in Ukraine. The backlash points to the already low public credibility of the Constitutional Court. President Zelenskiy took an uncompromising and confrontational stance against the Court. He submitted a draft law to the parliament to invalidate the controversial decision and release all constitutional justices from incumbent positions. It seems that so far the President's call lingers on with no reaction from the respective parliamentary committee. Additionally, Zelenskiy publicly called on the justices to voluntarily resign from their positions. It should be noted that the Constitution grants neither the president nor parliament the power to remove constitutional justices from their posts. Additionally, Article 20 of the Law on the Constitutional Court of 2017 contains a closed list of when the mandate of a

constitutional justice ends (e.g. reaching an age limit of 70 years, gaining citizenship of a foreign country etc.).

Many civil society agents active in anti-corruption monitoring fiercely criticized the constitutional justices, accusing them of being personally corrupted individuals, and covering up for corrupt political elites. To understand this response from civil society, a look at the political context around the judiciary should be taken. Ukraine's courts have long enjoyed only little public support and credibility. This is true for both pre an post-Euromaidan years with surveys showing little change in public attitudes towards the judiciary and the courts. This is even more true regarding the Constitutional Court as this institution already suffered backlash for its decisions during the Yanukovych-era and was paralyzed for a while by the decision of the parliament to oust some incumbent justices back in 2014 following the revolutionary change in Ukraine.

Threats to the rule of law

In the aftermath of Euromaidan, Ukraine has witnessed a vast array of laws introduced to reform the institutional set-up of the judiciary. In 2016-2018, new laws on the system of courts and the judiciary and the Constitutional Court were adopted. The objective of the judicial reform was to depoliticize the appointment process of judges, raise professional standards within the judiciary as well as enhance independence of the judicial branch. Yet, the puzzle of Ukraine's situation around the courts is that despite extensive institutional changes in the years following Euromaidan, the changes themselves did not lead to greater public acceptance of the judiciary as a credible institution in Ukraine. This is why civil society agents, who most naturally should defend the rule of law and the judicial branch from interference by political incumbents, stepped out opposing the Court in this particular case. The concern over the integrity of an anti-corruption system preoccupies civil society agents more than the rule of law argument.

As for the reaction of the international community, EU Representation in Ukraine called on the Ukrainian government to restore the legislation cancelled by the Court as soon as possible. Moreover, the Presidents of the Venice Commission and GRECO sent a joint letter to Ukraine's parliament. Both urged the parliament to find a way out of the crisis without drastic measures to compromise the Constitutional Court. They stated that terminating the mandates of constitutional justices would mean egregious interference with judicial independence and might have negative and long-standing consequences for the rule of law in Ukraine. Curious enough, the international expert community is more conscious about rule of law sentiment than domestic civil society agents.

Finding a way out

As the constitutional crisis unfolds, it is clear that only the *Verkhovna Rada* can take a legitimate decision. In this regard, the President and the parliamentarians put forward some options ranging from drastic to a more lenient one in order to find a

way out of the crisis. As for the President's call to sack constitutional justices from incumbent positions, even though such a decision might appeal to some segments of civil society disappointed with the major reversal in the anti-corruption realm, it seems that compromising the judicial branch further will not go through parliament.

The same holds for the idea to block the work of the Court by raising the requirements for a quorum. Following the president's outcry, a group of MPs submitted a draft of the law offering to raise a quorum requirement for the Court from 12 to 17 justices. As there are currently 15 incumbent justices out of 18 envisaged by the law, this would effectively block the Court from taking any decision at all. In any case, at time of writing this text, four constitutional justices refused to participate in the Court's proceedings thus blocking constitutional adjudication from happening. The justices in question are Serhy Holovatiy (appointed in 2018), Oleg Pervomayskiy (2018), Viktor Kolesnik (2016) and Vasyl Lemak (2018). All these justices are Poroshenko-era appointees, all of them voted against the decision on the anti-corruption reform and wrote dissenting opinions. The refusal of the justices to take part in the work means that the Great Chamber of the Court cannot convene and issue decisions on the constitutionality of ordinary laws at this point.

In order to find a way out of the crisis, Dmytro Razumkov, the Speaker of the *Verkhovna Rada*, put forward a third option before the parliament. The Razumkov project consists of one provision that offers to restore the major provisions of the anti-corruption legislation as of October 27, 2020 (the day the Court issued its decision). The Legal Expert Service of the *Rada* already criticized this solution indicating that the decisions of the Constitutional Court must be executed. Therefore, the *Rada* cannot simply restore cancelled provisions to operate as if there was no decision by the Court. This implies that the *Rada* should work through the decision to account for the logic and the reasoning of the constitutional justices and cannot pretend that there was no decision at all.

As the *status quo* lingers on, with confidence in the Constitutional Court probably reaching its lowest level in modern history, a balanced decision needs to be found. On the one hand, the public sentiment to keep up with anti-corruption reform is understandable. Combatting corruption was a long-standing promise of post-Euromaidan elites. However, what is often missing from domestic public discussion about the events prompted by the decision of the Court is the fact that the rule of law is also at stake in the crisis. The integrity of the judicial branch should not be compromised further with any extraordinary and drastic decisions by the parliament. In fact, it seems that the experts of the Legal Service of the *Rada* proposed the most viable and legally sound solution – the parliament should account for and work through the critique of the Court in drafting a new version of anti-corruption legislation for Ukraine.

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